Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

DISTRIBUTEL, INC.

Petitioner,

vs.

STATE OF ALASKA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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28th day of May, 1997.

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Alaska Supreme Court improperly interpreted Alaska Statute chapter 45.63, which makes telephonic solicitations to any Alaskan, without first registering with the State, a felony, without regard to United States constitutional principles including commercial free speech, due process, equal protection, and the commerce clause.

2. Whether Congress, in the Telemarketing and Consumer Fraud and Abuse Protection Act, 15 U.S.C. § 6101 et seq., intended to preempt the field of restrictions on business-to-business interstate telemarketing.

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BASIS FOR JURISDICTION

(i) The Alaska Supreme Court issued its opinion in Distributel, Inc. v. State of Alaska, No. S-7157, 933 P.2d 1137 (Alaska 1997), on January 3, 1997.

(ii) The Alaska Supreme Court denied Distributel's petition for rehearing on February 27, 1997.

(iv) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

United States Constitution:

Article I, § 8, cl. 3 [Commerce Clause]

> The Congress shall have power. . . To regulate commerce with foreign nations, and among the several States and with the Indian Tribes.

Amendment I [Free Speech]

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V [Due Process]

> No person shall be . . . deprived of life, liberty, or property, without due process

> of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV, § 1 [Due Process and Equal Protection]

> . . . .No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

Telemarketing and Consumer Fraud and Abuse Protection Act:

15 U.S.C. § 6101. Findings

The Congress makes the following findings:

> (1) Telemarketing differs from other sales activities in that it can be carried out by sellers across State lines without direct contact with the consumer. Telemarketers also can be very mobile, easily moving from State to State.
>
> (2) Interstate telemarketing fraud has become a problem of such magnitude that the resources of the Federal Trade Commission are not sufficient to ensure adequate consumer protection from such fraud.
>
> (3) Consumers and others are estimated to lose $40 billion a year in telemarketing fraud.

(4) Consumers are victimized by other forms of telemarketing deception and abuse.

(5) Consequently, Congress should enact legislation that will offer consumers necessary protection from telemarketing deception and abuse.

15 U.S.C. § 6106. Definitions

. . . .

(4) The term "telemarketing" means a plan, program, or campaign which is conducted to induce purchases of goods or services by use of one or more telephones and which involves more than one interstate phone call. The term does not include the solicitation of sales through the mailing of a catalog which -

(A) contains a written description, or illustration of the goods or services offered for sale,

(B) includes the business address of the seller,

(C) includes multiple pages of written material or illustrations, and

(D) has been issued not less frequently than once a year,

where the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation.

Telemarketing Sales Rule

16 C.F.R. § 310.6. Exemptions

> The following acts or practices are exempt from this Rule:
>
> . . . .
>
> (g) Telephone calls between a telemarketer and any business, except calls involving the retail sale of nondurable office or cleaning supplies; provided, however, that § 310.5 of this Rule shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

Alaska Statute Sec. 45.50.471. Unlawful acts and practices

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce are declared to be unlawful.

(b) The terms "unfair methods of competition" and "unfair or deceptive acts or practices" include, but are not limited to, the following acts:

....

(35) violating AS 45.63 (telephonic solicitations)[.]

Alaska Statute Sec. 45.50.551(b). Civil Penalties.

(b) ... if the court finds that a person is using or has used an act or practice declared unlawful by AS 45.50.471, the attorney general, upon petition to the court, may recover, on behalf of the state, a civil penalty of not more than $5,000 per violation.

Alaska Statute Sec. 45.63.010. Registration

(a) A person may not sell or attempt to sell property or services by telephonic means if the person makes substantially the same offer on substantially the same terms to two or more persons, unless the telephonic seller is registered with the Department of Law at least 30 days before the solicitation campaign.

Alaska Statute Sec. 45.63.060(a). Criminal penalties

(a) A person who sells or attempts to sell property or services by telephonic means by making substantially the same offer on substantially the same terms to two or more persons without complying with the registration requirements of AS 45.63.010, or who solicits, or receives, payment for a purchase before receiving the written contract required by AS 45.63.020 is guilty of a class C felony.

Alaska Statute Sec. 45.63.070. Remedies not exclusive

The remedies in this chapter are in addition to other remedies available to a buyer or the department.

Alaska Statute Sec. 45.63.080. Exemptions

This chapter does not apply to a sale or attempted sale

....

(14) of property from a mail order catalog that is published on a regular, periodic basis and that describes or pictures the items for sale and prominently provides the specific price of each item;

....

(17) by a person who solicits a sale by a contact by telephonic means without intending to complete the sales presentation during the contact,

who does not complete the sales presentation during the contact, and who only completes the sales presentation at a later meeting in person, unless at the later meeting the solicitor attempts to collect payment for property or services delivered before the later meeting[.]

STATEMENT OF THE CASE

Petitioner Distributel, Inc., is incorporated under the laws of the State of California, with its principal place of business in San Diego, California. Distributel designs, manufactures, markets, and distributes from San Diego advertising specialty products to small businesses throughout the United States. It specializes in items such as pens, key holders, and magnetized cards, manufactured on a bulk basis and imprinted with the logo, name, and address of the particular business customer. Distributel depends on repeat business, generated generally by mailing out a several page color catalog that pictures and prices the products. In addition to employing design, manufacturing, handling, and shipping personnel, Distributel has in-house telemarketers who make cold calls ("lead generation calls") to catalog recipients (businesses) to solicit orders.

Distributel established a customer base in Alaska prior to 1993 when Alaska Statute ("AS") chapter 45.63 was enacted. AS 45.63 prohibits solicitations by telephonic means unless the person registers with the Alaska Department of Law or falls within one of the 18 exemptions provided by the Alaska Legislature. AS 45.63.060 makes a person who sells or attempts to sell property by telephonic means, without first registering, guilty of a Class C felony. AS 45.63.080(14) exempts a sale or attempted sale

> (14) of property from a mail order catalog that is published on a regular, periodic basis and that describes or pictures the items for sale and prominently provides for the specific price of each item.

Distributel was unaware of Alaska's telephonic registration law in 1993 and continued to do business in Alaska and elsewhere just as it had done prior to 1993. Litigation ensued. State of Alaska v. Distributel, Inc., Complaint for Injunction and Civil Penalties, Civ. No. 3AN-94-7353, filed on August 16, 1994. Alaska sought to impose a $5,000 fine pursuant to AS 45.50.551(b) for each telephonic solicitation call by Distributel to anyone in Alaska. Complaint at ¶ 24. Distributel raised state and federal constitutional issues (equal protection, due process, commerce clause, unlawful restraint of trade) in its September 12, 1994 Answer to Complaint. Distributel claimed that it came within the mail order catalog exemption, and therefore need not register.

Alaska sought a temporary restraining order (granted the same day it was filed) and a preliminary injunction. Distributel argued that constitutional issues should be considered. Sept. 16, 1994, Opposition to Motion for Prelminary Injunction, at pages 13-17 (restraint of trade, equal protection, due process, and commerce clause). A preliminary injunction was entered on October 11, 1994, without reference to the constitutional issues, other than the following comment from the bench:

> ...So what we have is a telemarketing company operating in Alaska that has not complied with Alaska's telemarketing regulations. The registration law must be complied with. I see no constitutional or

improper burden on Distributel in the registration requirements and find that they are entirely proper.

Distributel thereafter negotiated a dismissal of the $5,000 civil penalty per call enforcement action in exchange for a permanent injunction precluding Distributel from telephonic solicitations in Alaska until it registers[1] or obtains approval to operate under the mail order catalog exemption. Distributel sought approval, but was denied by the trial judge. A timely appeal was taken to the Alaska Supreme Court.

On appeal, Distributel raised several constitutional issues bearing upon the proper interpretation of AS 45.63. Opening Brief of Appellant at pp. 29-38; Reply Brief at pp. 16-19. The court ruled that Distributel waived all constitutional issues by virtue of having entered the stipulated permanent injunction. Distributel, Inc. v. State of Alaska, 933 P.2d 1137, 1138-39 (Alaska 1997). The court interpreted the

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[1] Registration is not a viable alternative for Distributel. The concern is not that the Alaska Attorney General will learn Distributel's name and address or that of its principals -- those are already known. The problem is that Alaska has legislated a body of detailed restrictions that accompany registration. Once registered, any compliance violation is a Class A Misdemeanor punishable by imprisonment of up to one year. AS 45.63.060. Compliance requirements include a "signed, written contract" which contains particular provisions. AS 45.63.020. Distributel's business is built on trusting its business customers to honor an oral order and by prompt turn around time between receiving an order and shipping the goods. The Alaska laws would inhibit that crucial service time and require that different, unwieldy business practices be employed in dealing with its Alaska-based businesses.

Alaska mail order catalog exemption without regard to constitutional constraints. Distributel's petition for rehearing on the constitutional issues was denied.

ARGUMENT

A. Constitutional Issues Should Be Taken into Account. The Alaska courts' interpretation of AS 45.63.080(14) to prevent Distributel from conducting interstate, business-to-business mail order catalog commerce in Alaska, with lead generation calls to its business customers, is unconstitutional as

> (a) an undue infringement upon Distributel's rights, including its rights to liberty, the pursuit of happiness, the rewards of its own industry, freedom of speech, and the right to conduct interstate commerce with its Alaska businesses;
>
> (b) a violation of due process by virtue of the overly broad and vague language of AS 45.63 which makes compliance and even-handed enforcement unduly difficult;
>
> (c) a violation of equal protection under the federal and state constitution; and/or
>
> (d) a violation of the Commerce Clause, Art. I, sec. 8, cl. 3 of the United States Constitution.

When it addressed telemarketing in 1993, the Alaska Legislature was concerned about telephone fraud whereby innocent Alaskans are induced by false or misleading promises of prizes to make credit card payments over the phone. Many exemptions were provided so as not to interfere with legitimate businesses. AS 45.63.080(1)-(18). The Alaska

Department of Law was to adopt regulations to implement AS 45.63. AS 45.63.090. The Department adopted regulations in March 1994 on registration of telephonic sellers, the information required, confirmation thereof, changes thereto, and certain definitions. 9 AAC 14.010-.900. The Department's regulations do not address the mail order catalog or other statutory exemptions.

Distributel does not offer phony prize awards or engage in other types of telephone fraud. Distributel delivers products to its customers COD, and does not accept payment before the products are made and delivered. Typographical errors in the logo, business name, or address, and other complaints, which are few, are resolved on a case-by-case basis.

AS 45.63 should have been interpreted to avoid implicating its constitutionality. Sutherland Statutory Construction explains at § 57.24:

> When the constitutionality of a statute is in question, and under one construction it can be upheld, while under the other it cannot, the court will adopt the construction supporting constitutionality. Also, if there are two possible interpretations of a statute, one which would raise a question of constitutionality, and another which would not, then the latter will be used.

AS 45.63 could have been construed so that Distributel comes within the mail order catalog exemption. Although it is in the public interest to be protected from fraud, that policy is not sufficient by itself to convert legitimate businessmen into criminals because they happen to use the phone in the course of what is otherwise conceded to be a legitimate

business. Several time honored reasons and policies fundamental to a free democratic society militate strongly in favor of Distributel and others similarly situated.

1. **Commercial Free Speech Is Entitled to "Some" Protection.** Terminiello v. Chicago, 337 U.S. 1, 4 (1949), held that speech, over the phone lines to private individuals, is constitutionally protected against censorship and punishment "unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."

That holding does not square with the effect of the Alaska court's ruling that a call from Distributel, inquiring whether a business that received a Distributel catalog might want to buy one or more items, can be prosecuted as a felony. Unless AS 45.63.080(14) is construed to include the business-to-business exception permitted by the Federal Trade Commissioner, see infra, AS 45.63 will chill the first amendment rights of mail order catalog marketers such as Distributel.

2. **The vagueness of AS 43.63.080(14) Violates Due Process.** Due process of law includes freedom from overly broad, unduly vague penal laws. Here the exemption in AS 45.63.080(14) is vague and ambiguous as to what activity qualifies for the mail order catalog exemption. A vague statute violates due process when its indefinite contours confer unbridled discretion upon government officials, which raises the prospect of uneven and discriminatory enforcement.

When the language of a penal statute is embellished by a state judiciary, as was done to AS 45.63.080(14), the statute should be overturned as

vague and overbroad. In Marks v. City of Anchorage, 500 P.2d 644, 646 (Alaska 1972), the Alaska Supreme Court held:

> A vague statute violates the due process clause both because it fails to give adequate notice to the ordinary citizen of what is prohibited and because its indefinite contours confer unbridled discretion on government officials and thereby raise the possibility of uneven and discriminatory enforcement. As appellants point out, the ordinance now before this court raises the spectre of all of these abuses: it prohibits conduct which is protected by the United States and Alaska constitutions, it fails to give adequate notice of what conduct is prohibited, and it gives enforcement officials excessive discretion.

Citizens of the United States are entitled to protection against arbitrary discretion by state prosecutors. See State v. Christensen, 329 N.W.2d 382 (Wis. 1983). In Christensen, the Wisconsin Supreme Court held

> Since the power to declare what conduct is subject to penal sanctions is legislative rather than judicial, it would risk judicial usurpation of the legislative function for a court to enforce a penalty where the legislature had not clearly and unequivocally prescribed it.

AS 45.63.080(14) appears to exempt mail order catalog sales activity, but does not give adequate notice to businesses such as Distributel that their mail order catalog practices may not be exempt in the eyes of the state prosecutor or the Alaska courts.

AS 45.63.080(14) leaves too much enforcement discretion. Distributel has Alaska-based competitors and 24 to 36 competitors in the San Diego area, who compete in Alaska, none of whom have registered under AS 45.63. Only Distributel was singled out for enforcement action. Distributel's competitors now serve the business customers that Distributel developed prior to enactment of AS 45.63.

3. **The Commerce Clause Protects Interstate Commerce Unless Compelling State Interests Are Involved.** Distributel does not make calls to residential citizens, and does not make calls at irregular hours (that is, outside the hours of 8 a.m. to 5 p.m.). No compelling public policy argument can fairly be made in the context of businesses dealing at arms length with one another. See AS 45.02.104(c) ("Between merchants"); 16 C.F.R. § 310.6(g) (telemarketing law exemption for business to business solicitations).

The very fact that the Alaska Legislature exempted so many businesses from AS 45.63, including mail order catalog businesses, shows that the state interest involved in AS 45.63 is not compelling. AS 45.63 as interpreted and applied by Alaska constitutes a violation of the Commerce Clause of the Constitution of the United States. In Shepherd v. State, Dept. of Fish and Game, 897 P.2d 33 (Alaska 1995), the following is found at page 41:

> The Commerce Clause of the United States Constitution grants to Congress the power to "regulate commerce . . . among the several states." U.S. Const. art. I, Sec. 8. In addition to granting regulatory power to Congress, the Commerce Clause also restricts the power of the states to erect

barriers to interstate commerce. See, e.g., Maine v. Taylor, 477 U.S. 131, 137, 106 S. Ct. 2440, 2446-47, 91 L. Ed. 2d 110 (1986).

AS 45.63 as interpreted and applied to Distributel constitutes a barrier to interstate commerce. AS 45.63 makes it unlawful for Distributel to make, deliver, and be paid by a customer for goods in the absence of a signed, written contract. AS 45.63.020. Distributel manufactures its products in California and sells them to customers throughout the United States, including Alaska, without "signed, written contracts." This is a classic example of interstate commerce, and a classic example of a state law impermissibly erecting a barrier to that commerce.

4. AS 45.63 Violates Equal Protection by Favoring Alaska-Based Businesses. It is no defense to the restraint of trade barrier to say that Alaska-based companies might be similarly treated. AS 45.63.080(17) renders any such argument untenable. AS 45.63.080(17) favors Alaska-based companies because it exempts telemarketers based in Alaska by providing an exemption where there is "a later meeting in person." The exemption in .080(17) permits cold sales calls so long as the sales person does not intend "to complete the sales presentation during the contact[.]"

Alaska-based competitors of Distributel have an advantage because they can meet the .080(17) exemption, which Distributel, as a California-based company, can not. More directly, however, is the fact that Alaska-based competitors of Distributel can open their doors to the Alaska public, do not have to deliver their products through the mail or handle orders at a distance, and therefore are not restricted by AS 45.63.

Were Distributel to register under AS 45.63, Alaska-based competitors would enjoy a distinct advantage over Distributel because of the requirement of AS 45.63.020 that a signed, written contract must be received from a customer before the customer can be charged. One of the factors which enables Distributel to compete is its short turn around time between receipt of an order and deliver of the customized products to the customer. If Distributel were constrained by .020, given the time lag involved for interstate mail service, it would either have to delay production and delivery of its goods to Alaska customers or proceed to deliver and simply hope that it would eventually receive a written contract so that it could charge the customer. Neither alternative is acceptable.

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution protects against arbitrary and unreasonable classifications. The Alaska Legislature may not arbitrarily or irrationally subject a special group to treatment not accorded citizens at large. In considering an equal protection challenge, the court is to look to the purpose of the statute, determine whether the purpose is legitimate and whether the means chosen have "a fair and substantial" relationship to the goals of the enactment, and, if so, to balance the state interest in the means against the constitutional rights of those affected. See Williams v. Zobel, 619 P.2d 422, 427 & 431 n.1 (Alaska 1980). The federal test is similar, though less stringent. It asks whether the classification is "rationally" related to a legitimate purpose the legislature could have had. Zobel v. Williams, 457 U.S. 55, 60 (1982).

The purpose underlying AS 45.63 is to protect Alaska citizens from telephonic fraud. The means chosen, however, including the requirements of awaiting a signed, written contract, and the special warranties, guarantees, and refund policies required by Alaska law, are questionable. The construction which the State has given the mail order catalog exemption is discriminatory as between Distributel and its competitors, particularly its Alaska-based competitors.

An Alaska-based competitor can offer the same or similar line of customized products to walk-in or phone-order business customers, without having to register under AS 45.63 whether it offers a mail order catalog or not. It can make cold sales calls under .080(17) by simply asking the potential customer to "meet later in person" at the store to close the deal. That sort of discrimination in favor of Alaska-based competitors should be unlawful.

B. The FTC Rules Preempt State Regulation of Interstate Mail Order Catalog Business Between Businesses.

In Gade v. National Solid Wastes Management Association, 505 U.S. 88 (1992), this Court held, "[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent. 'The purpose of Congress is the ultimate touchstone.'" Gade, 505 U.S. at 96, quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985) quoting Malone v. White Motor Corp., 435 U.S. 497 (1978). "Pre-emption may be either expressed or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Gade, 505 U.S. at 98, quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). "[A]ny

state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." Gade, 505 U.S. at 108, quoting Felder v. Casey, 487 U.S. 131, 138 (1988)

Congress provided an exemption for the solicitation of sales through the mailing of a catalog, so long as lead generation calls to customers are not made. 15 U.S.C. § 6106(4). 15 U.S.C. § 6102(a)(1) provides that the Federal Trade Commission "shall" prescribe rules regarding deceptive and other abusive telemarketing acts or practices. After considering competing views on the subject of a blanket business-to-business exemption from the telemarketing laws, the Commission promulgated a final regulation that provided seven exemptions, including,

> (g) Telephone calls between a telemarketer and any business[.]

16 C.F.R. § 310.6(g); see 60 Fed. Reg. 43842 (1995). The Commission thereby expanded the mail order catalog exemption to permit lead generation calls to businesses.

The House Report provides that "[r]egulating legitimate, mutually-beneficial activities is not the purpose of this legislation. Instead, the Committee has focused the legislation on unscrupulous activities from which no one benefits but the perpetrator." House Report No. 103-20, 103rd Cong., 1st Sess. (1993). The Report notes that the "FTC has been the lead regulatory agency in dealing with interstate telemarketing fraud." Id. The Report adds that the "Committee is not interested in further regulating the legitimate telemarketing industry through this legislation." Id. The Committee directed the FTC to

"make clear that intent to defraud is a requisite part of any fraudulent telemarketing activities." Id.

Read together, Congress and the Commission have occupied the entire field regarding telemarketing by mail order catalog marketers to business customers so as to pre-empt contrary state laws on the subject. See Gracia v. Volvo Europa Truck, N.V., -- F.3rd--, 1997 WL 199261 (7th Cir. 1997), at 2 (field preemption). Because such calls are lawful under federal law, Alaska should not be permitted to make felons out of legitimate interstate businessmen who market their catalog products by phone to business customers. See, e.g., id., at 2 (conflict preemption).

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to review the construction that the Alaska Supreme Court has given, without regard to constitutional issues, the mail order catalog exemption under AS 45.63.080(14).

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